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NO.

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

PATRICK CURTIS MARTIN
Appellant,
vs.

THE GEORGIA DEPARTMENT
OF PUBLIC SAFETY, HUGH
HARDISON AND D.E. COCHRAN,
Appellees.

ON APPEAL FROM
THE SUPREME COURT OF GEORGIA

JURISDICTIONAL STATEMENT

David W. Griffeth
Counsel of Record

J. Richardson Brannon

Suite 201
957 Baxter Street
Athens, Georgia 30606
Telephone: (404) 353-1360

QUESTIONS PRESENTED

1. Whether the doctrine of sovereign immunity as applied by the state of Georgia is violative of the Federal Constitution's equal protection guarantee to all citizens of the United States.

2. Whether 42 U.S.C.A. Section 1983 creates a cause of action for the deprivation of a constitutional right only when the cause of action is based upon acts which are pursuant to an impermissible and corrupt policy which is intentional and deliberate.

3. Whether gross negligence is the appropriate standard to support a cause of action under 42 U.S.C.A. Section 1983 for a violation of Due Process.

4. Whether a person who acts under color of state law and in implementation of official policy is exempt, as a matter of law, from a 42 U.S.C.A. Section 1983 cause

of action because he was operating an automobile at the time the cause of action arose.*

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*In Compliance with Rules 10.4 and 15.1(b), the following information is offered with respect to the parties to this preceding:

The Georgia Department of Public Safety
Hugh Hardison
D.E. Cochran

The Clerk of this Court is hereby notified that the following listed parties to the proceeding in the courts below would appear to be no longer interested in the outcome of the issues raised on this appeal:

Charles Brewer
Alan Seabolt
Kenneth Seabolt
Lumpkin County, Georgia

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PUBLIC SAFETY, HUGH HARDISON,
and D.E. COCHRAN,
Appellees.

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Supreme Court of Georgia is reported at 257 Ga. 300, 357 S.E.2d 569 (1987) and is contained in Appendix I. The order of the Superior Court of Fulton County, Georgia, granting summary judgment against the Appellant is unreported but is contained in Appendix II.

JURISDICTION

Judgment in the Supreme Court of Georgia was entered on June 25, 1987. All motions for a rehearing were ultimately denied on July 29, 1987, at which time a revised opinion was issued, from which this appeal is taken. Notice of Appeal was filed in the Supreme Court of Georgia on October 26, 1987, with a copy filed that date in the Superior Court of Fulton County, Georgia. The jurisdiction of this Court is invoked under 28 U.S.C.A. Section 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution , Amendment XIV, Section 1:

> . . .No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of

law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C.A. Section 1983, in part:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Patrick Curtis Martin, Appellant, is an eight year old child who was rendered a C-2/C-3 complete quadriplegic as a result of injuries he suffered in a collision on November 9, 1984, while he was a passenger in his grandmother's car. His grandmother was killed in the collision. Appellees are the Georgia Department of Public Safety; Hugh Hardison, the former Commissioner of the Georgia Department of Public Safety; and D.E. Cochran, a Georgia State Patrolman.

The facts giving rise to this appeal are as follows: On the afternoon of the collision in which Appellant was injured, Appellee Cochran initiated a high speed chase in pursuit of Charles Brewer who had committed a traffic violation by exceeding the posted speed limit. Appellee Cochran's chase covered twenty-three miles and two

different counties, lasted for nearly twenty-two minutes and involved speeds in excess of 100 miles per hour, mostly on two lane roads in the North Georgia mountains. Police from three different counties joined in the chase following Appellee Cochran's call for assistance.

Appellee Cochran was in radio contact with Alan Seabolt, Deputy Sheriff of Lumpkin County, Georgia, who agreed to attempt to block an intersection in hopes of intercepting Brewer. Appellee Cochran instructed Seabolt to "hurry up" because the pursuit was rapidly approaching the intersection in question. Immediately following this contact, Deputy Sheriff Seabolt rounded a curve at an excessive speed, lost control of his car and slammed broadside into the car driven by Appellant's grandmother. As a result of this collision, Patrick Curtis Martin

became, at the age of five years, an irreversible quadriplegic.

During the pre-trial stage of this action, Appellant discovered from Appellees information demonstrating that a collision involving a Georgia state trooper during a high speed chase is not an isolated or unforseeable event. Appellee Georgia Department of Public Safety produced over 150 accident reports from recent years involving high speed chases and Georgia State Patrol vehicles, a significant number of which had resulted in death or injury in addition to property damage. In many of these accident reports, the State Patrolman was found to be at fault, yet Commissioner Hardison testified that he knew of no occasion when a State Patrolman had been the subject of as much as a reprimand as a result of his unlawful conduct in a high speed chase.

Appellee Hardison admitted during discovery that the Department of Public Safety's policy with respect to when a state trooper should engage in or terminate a high speed chase was subjective and was left entirely up to the trooper behind the wheel at any given time. Appellee Cochran and other state patrolmen implement this policy under color of law.

Appellant initially brought this action in the Superior Court of Fulton County, Georgia, naming as Defendants the three Appellees in this appeal and four other Defendants. Appellant's claims against the three Appellees were founded both in negligence and in 42 U.S.C.A. Section 1983. On October 25, 1985, the Appellees filed Motions for Summary Judgment, asserting among other things that the doctrine of sovereign immunity barred the action. These Motions were granted by the trial court on June 5, 1986, without

that court's issuing an opinion. Appellant then appealed the grant of summary judgment to the Supreme Court of Georgia.

On June 25, 1987, the Supreme Court of Georgia, in a unanimous decision, affirmed the grant of summary judgment as to Hugh Hardison, affirmed in part and reversed in part as to D.E. Cochran and reversed as to the Georgia Department of Public Safety. In doing so, the Supreme Court of Georgia concluded that the trial court had correctly granted summary judgment as to the Appellant's 42 U.S.C.A Section 1983 claim. The Court also, without undertaking the equal protection analysis requested by Appellant, refused to hold the doctrine of sovereign immunity violative of the equal protection clause of the United States Constitution. On July 29, 1987, the Supreme Court of Georgia denied the

parties' motions for rehearing and issued its final revised opinion.

THE QUESTIONS ARE SUBSTANTIAL

I. THE GEORGIA SUPREME COURT ERRED IN UPHOLDING THE STATE'S DOCTRINE OF SOVEREIGN IMMUNITY AGAINST THE CHALLENGE THAT SOVEREIGN IMMUNITY VIOLATES THE FEDERAL CONSTITUTION'S EQUAL PROTECTION CLAUSE BY GENERATING INVIDIOUS CLASSIFICATIONS WITHOUT A COMPELLING STATE INTEREST.

The Fourteenth Amendment of the United States Constitution guarantees to all persons similarly situated the equal protection of the laws. "If a challenged statute places a burden upon 'suspect classes' of persons or on a constitutional right that is deemed to be 'fundamental' then this Court will depart from traditional equal protection principles," Clements v. Fashing, 457 U.S. 957 (1982) "and apply a strict scrutiny test to the statute." San Antonio School District v. Rodriquez, 411 U.S. 1 (1973); Dunn v.

Blumstein, 405 U.S. 330 (1972). The Georgia provision of sovereign immunity establishes invidious classifications which randomly deny to certain individuals the fundamental rights of life and liberty and the right to redress for injuries done, and is therefore subject to a strict scrutiny analysis.

The Georgia doctrine of sovereign immunity draws a discriminatory distinction between victims of negligence injured by a private, non-governmental tortfeasor, and those injured by a public, governmental tortfeasor. Those innocent victims, such as Patrick Curtis Martin, who fall into the latter classification are deprived of their right to fully recover for injuries wrongfully received, and of their fundamental interest in life, liberty and property.

In light of the required strict scrutiny standard, the Georgia Supreme Court erred by upholding the doctrine of sovereign immunity against the equal protection challenge. The strict scrutiny standard requires the state to demonstrate a compelling interest to justify a statute that creates invidious classifications. The challenged statute does not enjoy any presumption of validity, and the state must prove that the classification system is precisely structured and narrowly tailored to serve legitimate interests, and that it has selected the least drastic means for effectuating its interests. San Antonio School District, supra, 411 U.S. at 16-17.

The Supreme Court of Georgia, in deciding that "present public policy has been clearly expressed" by the passage of the sovereign immunity provision has failed to undertake the necessary analysis as required by this Court's decisions in Dunn

and San Antonio School District. The Georgia Supreme Court has further erred by finding that public policy and a desire to protect the public purse are interests compelling enough to justify the retention of sovereign immunity. The bare assertion of a threat to the public purse falls "far short of justifying a discrimination which infringes upon fundamental rights." White v. State, 661 P.2d 1272 (Mont. 1983).

The government has a valid interest in protecting its treasury. However, there is no evidence that the payment of such claims would impair the state's ability to function as a governmental entity or create a financial crisis. Furthermore, a person's right to redress by due process of law must not become less worthy of protection because he or she was injured by an agency of the state. The discriminatory

classifications generated by the doctrine of sovereign immunity are arbitrary and forced, and act to deprive citizens of their fundamental interests in liberty. There are no compelling state interests with which to justify the retention of this archaic doctrine and the Georgia Supreme Court erred in upholding the provision of sovereign immunity in the Georgia Constitution against an equal protection challenge.

II. IN HOLDING THAT 42 U.S.C.A. SECTION 1983 CREATES A CAUSE OF ACTION FOR THE DEPRIVATION OF A CONSTITUTIONAL RIGHT ONLY WHEN THE CAUSE OFACTION IS BASED UPON ACTS WHICH ARE PURSUANT TO AN IMPERMISSIBLE OR CORRUPT POLICY OF A PUBLIC AGENCY WHICH IS INTENTIONAL AND DELIBERATE, THE SUPREME COURT OF GEORGIA HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

The Supreme Court of Georgia has ruled that as a matter of law none of the Appellees can be liable under 42 U.S.C.A.

Section 1983 based on its interpretation of federal law. In both the case sub judice and in City of Cave Spring v. Mason, 252 Ga. 3 (1984), the Georgia Supreme Court has held that the following standard must be met in order to support a cause of action under Section 1983:

> We interpret 42 U.S.C.A. Section 1983 to create a cause of action, cognizable by the courts of this state, based upon acts which are in implementation of an intentional policy, adopted or ratified by the governing body of a public agency, which acts work deprivation of a constitutional right. Such a policy may be formal or informal, acknowledged or vigorously denied, persistent or intermittent, or implemented by but one single act. What is required to be proved, directly or circumstantially, is that a governing body has worked constitutional deprivation of a citizen pursuant to an impermissible or corrupt policy which is intentional and deliberate.

However, other than relying on its own decision in City of Cave Spring, supra, the Georgia Court cites no cases in support of the holding that an intentional and

corrupt policy must be shown under Section 1983.

Moreover, the Georgia Court's decision as to the standard that is appropriate in a cause of action under Section 1983 is ambiguous. After first concluding that Section 1983 requires acts that are in implementation of an "impermissible or corrupt policy that is intentional or deliberate", the Georgia Court goes on to decide that a Section 1983 cause of action can be supported against Appellees Hardison and Cochran based on a standard of gross negligence, but that as a matter of law there was no material issue of fact presented by the record which would allow the jury to consider the question of gross negligence as against Appellees Cochran, Hardison and Georgia Department of Public Safety. The opinion really raises two separate but related issues with respect to the requisite standard. The first goes to

the governmental policy in question while the second deals with the level of care of the governmental actor.

In this case, the policy in question is the Georgia Department of Public Safety's policy for high speed chases by state troopers. Appellant has asserted that Appellees Hardison and the Department of Public Safety, of which Hardison is an agent, are liable for depriving Appellant of his constitutionally protected rights through this policy. Appellee Hardison, as Commissioner, had the affirmative responsibility of establishing and implementing Department policy, yet in the face of a general and mounting pattern of damages, injuries and death resulting from high speed chases, took no remedial measures to correct the policy so as to eliminate or reduce the constitutional violations. The deliberate indifference to

the consequences of the policy he had adopted for high speed chases was the moving force behind the injury suffered by Appellant.

While arguments could be made that this policy in itself is unconstitutional, it is clear that this Court has not held that Section 1983 requires a per se unconstitutional policy or custom as long as the causal link between the policy and the constitutional deprivation has been established. This was explained in the closely related, but not identical, context of municipal liability. In City of Oklahoma City v. Tuttle, 471 U.S. 808 (1984) this Court stated at 824:

> Where the policy relied upon is not in itself unconstitutional, considerably more proof than a single incident will be necessary in every case to establish both a requisite fault on the part of the municipality, and the causal connection between the 'policy' and the constitutional deprivation.

The Court expanded on this statement in n.7 at 824:

> We express no opinion on whether a policy that itself is not unconstitutional, such as the general 'inadequate training' alleged here, can ever meet the policy requirement of Monell.

The recent case of City of Springfield v. Kibbe, 107 S.Ct. 1114 (1987), while not decided on the merits, also discussed in the dissenting opinion the type of policy needed to establish municipal liability. The dissent stated at 1121:

> The plurality opinion in Tuttle made clear that to establish municipal liability for a policy that is not itself unconstitutional, the plaintiff must introduce evidence sufficient to establish the existence of the policy; evidence showing that the city was at fault for establishing the policy; and evidence establishing that the policy was the moving force in causing the constitutional harm.

Therefore, in holding that a 42 U.S.C.A. Section 1983 cause of action requires proof that a governing body has worked a constitutional deprivation of a citizen pursuant to an impermissible or

corrupt policy which is intentional and deliberate, the Georgia Supreme Court has rendered a decision on a federal question that has not as yet been resolved by this Court. This issue should be addressed to ensure that citizens of Georgia are afforded the same constitutional protections as are other citizens of the United States. A related question on which the Court needs to provide guidance is whether, when a governmental policy is involved, the standard required to establish municipal liability under Section 1983 is the same standard that will support a claim against a state official under Section 1983.

III. IN HOLDING THAT GROSS NEGLIGENCE IS THE REQUIRED STANDARD TO BE MET TO SUPPORT A CAUSE OF ACTION UNDER 42 U.S.C.A. SECTION 1983 FOR A VIOLATION OF DUE PROCESS, THE SUPREME COURT OF GEORGIA HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

With respect to Appellees Hardison and the Department of Public Safety, the Georgia Supreme Court has held that at least a showing of gross negligence is necessary to establish liability for inadequate training. On this basis the Georgia Court upheld the trial court's grant of summary judgment as to Appellant's Section 1983 claims against these two Appellees, holding that no issue of material fact was presented by the record below which would allow the jury to consider the question of gross negligence vel non of Appellees.

Clearly, the Georgia Supreme Court has misapprehended the nature of this case. Appellant has not claimed that Appellees Hardison and the Department of Public Safety are liable under Section 1983 merely for a failure to train Department employees. Their liability under Section

1983 is based on their having affirmatively maintained a written policy and an established custom that enabled Georgia state troopers to engage in high speed chases without any objective standard of care by which to govern their conduct. It is also based on their having recklessly disregarded the mounting numbers of injuries, fatalities and property damage engendered by these pursuits and the violation of Georgia law by state troopers. Even assuming that the Georgia Court is correct as to the standard of care that must be shown under Section 1983, it is clear that the facts in this case have demonstrated not only tacit authorization but gross negligence amounting to deliberate indifference by the Appellees.

However, recent cases that have come down from this Court have not as yet determined the standard of care, or lack of

care, that will trigger the protections of the Due Process clause and thereby support a cause of action under Section 1983. In Daniels v. Williams, 474 U.S. 329 (1986), and in Davidson v. Cannon, 474 U.S. 344 (1986), this Court concluded only that the Due Process clause of the Fourteenth Amendment is not implicated by a lack of due care of a state official causing unintended injury to life, liberty or property. Therefore, this Court has decided that mere negligence by a governmental official will not support a claim for relief under Section 1983 based upon the Fourteenth Amendment, but it has left undecided the question as to the standard within the spectrum between negligence and intent that will establish a Due Process violation.

In Daniels, supra, at 343, n.3, this Court stated that it had been afforded "no occasion to consider whether something less

than intentional conduct such as recklessness or 'gross negligence' is enough to trigger the protections of the due process clause." And later, in City of Springfield v. Kibbe, 107 S.Ct. 1114 (1987), in the related context of municipal liability, the Court was again unable to reach the negligence question, but there was ample discussion in the dissenting opinion, by Justice O'Connor, as to the need for reaching and settling this issue.

The Supreme Court of Georgia, however, has not been reluctant to reach and decide the negligence question and has held that the appropriate standard for a state official, at least with respect to inadequate training, is gross negligence. In support of its ruling, the Georgia Court has relied on Cannon v. Taylor, 782 F.2d 947, 951 (11th Cir. 1986) and Reeves v. City of Jackson, 608 F.2d 644,

652 (5th Cir. 1979), decisions of two lower federal courts which, of course, do not bind this Court. In addition, these cases deal with municipal liability, rather than with the liability of a state official, and it is not clear whether the same standards of care are applicable.

Appellant believes that not only has the Georgia Court ignored the full range of issues involved in Appellees' asserted liability by basing it merely on inadequate training, but it has also decided an important question of federal law that this Court ought to decide. Included within the question as to whether gross negligence is the appropriate standard of care that will trigger the Due Process clause are the following issues: whether that standard is limited to claims based on inadequate training; whether tacit authorization and deliberate indifference are the equivalent of gross negligence; and whether the

standard of care that is required in a claim for municipal liability is also the standard to be met in a Section 1983 claim against a state official.

IV. IN HOLDING THAT A STATE TROOPER WHO ACTED UNDER COLOR OF LAW AND IN IMPLEMENTATION OF OFFICIAL POLICY IS EXEMPT, AS A MATTER OF LAW, FROM A 42 U.S.C.A. SECTION 1983 CAUSE OF ACTION BECAUSE HE WAS OPERATING AN AUTOMOBILE AT THE TIME THE CAUSE OF ACTION AROSE, THE SUPREME COURT OF GEORGIA HAS DECIDED A FEDERAL QUESTION IN A WAY THAT CANNOT BE SUPPORTED BY DECISIONS OF THIS COURT.

The Georgia Supreme Court determined that under the facts of this case Appellee Cochran could not be held liable under Section 1983. The Court stated: "As was said in Cannon v. Taylor, 782 F.2d 947, 950 (11th Cir. 1986), '[A]utomobile negligence actions [against policemen acting in the line of duty] are grist for the state law mill. But they do not rise to the level of a constitutional deprivation.'"

Here again, the Georgia Court has misinterpreted the nature of the claim against the Appellee. The Section 1983 claim against Appellee Cochran is not based upon mere automobile negligence, and the facts clearly indicate that this Appellee was not present at the collision that injured Appellant. However, this is not to say that Appellee Cochran failed to participate in the events that culminated in the constitutional deprivation. In keeping with the policy maintained by Appellees Hardison and Department of Public Safety that allowed troopers to use their subjective judgment as to how to proceed, State Patrolman Cochran initiated the high speed chase of Charles Brewer for a mere traffic violation, recklessly escalated the pursuit and needlessly encouraged the involvement of numerous other law enforcement officials, all of which

combined to proximately cause Appellant's injuries.

In Cannon, supra, at 950, the 11th Circuit has held that "a person injured in an automobile accident caused by the negligent, or even grossly negligent, operation of a motor vehicle by a policeman acting in the line of duty has no section 1983 cause of action for violation of a federal right." Cannon relies on a 5th Circuit case, Walton v. Salter, 547 F.2d 824 (5th Cir. 1976), which was decided on the narrow ground that a single isolated instance of negligent operation of a police car would not state a claim under Section 1983. Cannon, too, dealt with a claim based on a single instance of police misconduct. Therefore, neither of these cases is an appropriate precedent for Appellant's case since both Cannon and Walton lack the record of consistent, continuing and widespread abuse by State

Troopers that is present in this case. Appellant has clearly established a pattern of similar incidents in which citizens have been injured or endangered by policemen's misconduct, and that pattern distinguishes Appellant's constitutional deprivation from mere automobile negligence. See, e.g., Languirand v. Hayden, 717 F.2d 220, 227 (5th Cir. 1983).

The Cannon decision also cites Paul v. Davis, 424 U.S. 693 (1976), in support of the proposition that there is no Section 1983 cause of action for injuries caused by automobile negligence. The primary issue decided in that case was whether reputation is an interest sufficient in itself to invoke the procedural protection of the Due Process clause. However, in what is assuredly dictum, this Court also commented, at 698, that "it would be difficult to see why the survivors of an

innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle, would not have claims equally cognizable under Section 1983."

It is a broad leap from this observation to the conclusion in Cannon that a person injured in an automobile accident caused by the negligent, or even grossly negligent, operation of a motor vehicle by a policeman acting in the line of duty has no Section 1983 cause of action. Whether or not an individual has a Section 1983 cause of action must depend on the facts of the particular case, and a claim of constitutional deprivation should not be summarily dismissed based on an arbitrary categorization of the manner in which the injury or damage was inflicted.

Section 1983 was enacted to provide federal protection to citizens of all the states from the abuse of official power,

and Appellant is unable to see how the instrumentality that is used for this abuse changes the right to protection.

If the Appellant had been the victim of a warrantless search by police (see, e.g., Wanger v. Bonner, 621 F.2d 675 (5th Cir. 1980)); or the victim of an assault by police (see, e.g., Leite v. Providence, 463 F.Supp. 585 (D.R.I. 1978)); or suffocated by a policeman's chokehold (see, e.g., McQurter v. City of Atlanta, 572 F.Supp. 1401 (N.D. Ga. 1983)); or if he had been shot in the head during a high speed chase (see, e.g., Kibbe v. City of Springfield, 777 F.2d 801 (1st Cir. 1985)); he would at least have had the opportunity to demonstrate his claim under Section 1983. Under the Georgia Court's analysis, though, Appellant is summarily precluded from any federal remedy against Appellees because, and only because, Cochran and the other law

enforcement officials involved were driving automobiles.

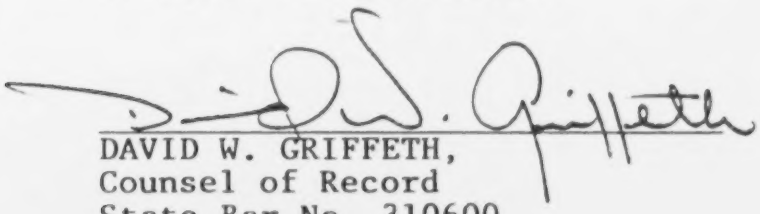
Appellant is aware that Section 1983 actions have been brought in a variety of contexts, and that the results in the courts are not always consistent. As the dissenting opinion in Jackson v. City of Joliet, 465 U.S. 1049 (1984) stated: "The inconsistent results below are attributable, at least in part, to the lack of definitive guidelines for determining when tortious conduct by state officials rises to the level of a constitutional tort." Appellant urges this Court to take the opportunity to provide guidance to all courts that deal with federal rights as to whether a Section 1983 cause of action can be categorically precluded based on the fact that an automobile is involved.

CONCLUSION

For the above and foregoing reasons, this Court should grant plenary consideration of the appeal.

RESPECTFULLY SUBMITTED,

ATTORNEY FOR APPELLANT



DAVID W. GRIFFETH,
Counsel of Record
State Bar No. 310600

J. RICHARDSON BRANNON

Suite 201
957 Baxter Street
Athens, Georgia 30606
(404) 353-1360

"APPENDIX I"

THE MOTION FOR A REHEARING
WAS DENIED TODAY

JULY 29, 1987

44194. MARTIN v. GEORGIA DEPARTMENT OF PUBLIC SAFETY, ET AL.

Please substitute the attached opinion for the opinion previously forwarded to you.

In the Supreme Court of Georgia

Decided:

44194. MARTIN V. GEORGIA DEPARTMENT OF PUBLIC SAFETY, ET AL.

HUNT, Justice.

In a case of first impression, we are called upon to re-examine the status of sovereign immunity in this state after the enactment of the 1983 Constitution, which provides for the waiver of sovereign immunity for the state or its agencies where liability insurance has been purchased. 1983 Ga. Const., Art. I, Sec. 2, Para. 9. The trial court granted summary judgment to the Department of Public Safety, Commissioner Hardison and State Patrolman D.E. Cochran. The plaintiff appeals.

State Patrolman D.E. Cochran initiated a high-speed chase to apprehend Charles Brewer, who was detected by Cochran to be

speeding on Georgia Highway 400 in Lumpkin County. The subsequent chase covered 23 miles and two counties. It lasted 22 minutes and involved speeds in excess of 100 miles per hour, officers from three counties and the State Patrol. During the chase, Cochran was in radio contact with Alan Seabolt, a Lumpkin County Deputy Sheriff. The plan was that Seabolt would attempt to block an intersection ahead of Brewer and Cochran, thus ending the chase. At one point, Cochran requested Seabolt to hurry because Brewer was rapidly approaching the intersection in question. In that effort, Seabolt lost control of his car on a curve and crashed into a car driven by Martha Collins, knocking it down an embankment into a creek. She was killed, and her five-year-old grandson was rendered quadriplegic.

This tort suit was filed on behalf of the child against the Department of Public

Safety, then Commissioner Hugh Hardison, State Patrolman D.E. Cochran, Lumpkin County Deputy Sheriff Alan Seabolt, his superior Sheriff Kenneth Seabolt, and Charles Brewer. Claims against Commissioner Hardison were bottomed on negligence and 42 U.S.C. Section 1983, alleging failure to set out objective guidelines for high-speed chases and to train officers properly in that regard.

The Department, Hardison and Cochran argue that, notwithstanding the provisions of the 1983 Constitution, they are immune from the prosecution of this claim under the principle of sovereign immunity. We disagree.

Art. I, Sec. 2, Para. 9 of the 1983 Constitution provides that "Sovereign immunity extends to the state and all of its departments and agencies. . . . Also the defense of sovereign immunity is waived

as to those actions for the recovery of damages for any claim against the state or any of its departments or agencies for which liability insurance protection for such claims has been provided but only to the extent of any liability insurance provided." Thus, this section of the 1983 Constitution expresses the will of the people of this state that citizens injured by the actions of the state be compensated if insurance is available. Of course, the state is not required to provide insurance protection either through purchasing coverage from a private carrier or through the establishment of a self-insurance fund. But if it does either, the waiver operates and the proceeds of a self-insurance fund would stand on the same footing as those available from a policy issued by a private carrier. As pointed out by Justice Charles L. Weltner in his special concurrence in Toombs County, Georgia v. O'Neal, 254 Ga.

390, 393 (330 SE2d 95) (1985), "When a public body has purchased liability insurance, there is no necessity for the protection which sovereign immunity provides to the public. Conversely, the insurer, as a private, for-profit entity, should not be accorded the protection of sovereign immunity, which exists for the benefit of the public. Thus, . . . when the public utility of sovereign immunity has evaporated, that doctrine should not serve to shield what is purely a private interest." [Emphasis in original.] Our duty is to honor that articulation of public policy.

1. We first decline the plaintiff's and amici's invitation to abolish the doctrine of sovereign immunity by judicial fiat. While under the 1983 Constitution this court may address the constitutionality of a constitutional

provision as well as the constitutionally of other laws, 1983 Const. Art. 6, Sec. 6, Para. 2, we find that present public policy has been clearly expressed by the passage of the very constitutional provision the contenders argue gives us the power to abolish it. Compare Clark v. State of Georgia, 240 Ga. 188 (240 SE2d 5) (1977); Sheley v. Board of Public Education for the City of Savannah, 233 Ga. 487, (212 SE2d 627) (1975). There can be no mistaking the intention to preserve the protection of the public purse through the doctrine of sovereign immunity except to the extent that insurance has been purchased.

2. We next consider the question whether after the passage of Art. 1, Sec. 2, Para. 9 of the 1983 Constitution, the purchase of insurance for department employees under O.C.G.A. ch. 45-9 and O.C.G.A. Section 45-9-40 results in a

waiver of the sovereign immunity of the department itself and of the official immunity of the employees.

Before the 1983 constitutional amendment, Ch. 45-9, passed in 1977, provided for the purchase of liability insurance or establishment of a self-insurance fund: ". . .insuring or indemnifying such officers, officials or employees to the extent that they are not immune from liability against personal liability for damages arising out of the performance of their duties or in any way connected therewith." Section 45-9-5 states: "Nothing in this article shall constitute a waiver of the immunity of the state from any action." Cases decided after the passage of these provisions clearly continued to uphold the sovereign immunity of the state and the official immunity of state employees. E.g.,

Hennessey v. Webb, 245 Ga. 329 (264 SE2d 878) (1980).

In Robinson v. City of Decatur, 253 Ga. 779 (325 SE2d 752) (1985), however, decided after the passage of the 1983 Amendment, but in which the cause of action had arisen before its enactment, a change in public policy was foreshadowed. There, now Presiding Justice Clarke, concurring specially in the face of three dissenters who would have applied the waiver retroactively, wrote: "Constitutional principles and public policy would dictate that this waiver be applied to all sovereign immunity cases arising after the effective date of this amendment. However, the application of these principles and policies must wait until the proper case." Id. at 780. This is the proper case. As Justice Weltner said in his dissent in the same case, "when there is no jeopardy to the public treasury, the traditional choice

-- either unrequited damage to an individual or reparations from the public treasury -- no longer need be made."

In the case before us, the plaintiff asserts liability of the Department of Public Safety under principles of respondeat superior for the negligence of Cochran in initiating and continuing the pursuit of Brewer in reckless disregard of the safety of the public. Plaintiff additionally alleges negligence by the department in inadequately training and providing guidelines to its officers in order to minimize injuries in high-speed chases. That negligence is attributed to former Commissioner Hardison. The department admits that these employees are covered by a comprehensive general liability policy.

The comprehensive general liability trust fund includes the following pertinent

provisions:

"This policy covers the following: PERSONAL INJURY, BODILY INJURY, SICKNESS, DISEASE OR DEATH AND PROPERTY DAMAGE caused by or resulting from error, omission or negligence in the performance of duties within the scope of an insured's employment with a participating entity that has purchased coverage prior to the date of the occurrence.

"In consideration of the payment of the appropriate premium, and subject to all of the limitations set forth in this policy or any addendum hereto, the Fund hereby agrees that it will provide the following coverage:

"A) Comprehensive general liability insurance. The Fund will pay on behalf of any insured, all sums which the insured shall become legally obligated to pay as damages, court costs and attorney fees, because of bodily injury, property damage

or personal injury resulting from any job related occurrences caused by any insured. . . .

"B) Occupational errors or omissions liability insurance. The Fund will pay on behalf of any insured, all sums which the insured shall become legally obligated to pay as damages, court costs and attorney fees, arising out of the performance of or failure to perform official duties in the insured's capacity as an officer or employee and caused by the insured. The Fund will also pay on behalf of the insured all such sums within the policy limits arising out of the rendering of or failure to render services by any person for whose acts or failure to act such insured is legally responsible by reason of the insured's position." [Emphasis in original.] Thus, this insurance fund covers the negligent acts "arising out of

the performance of or failure to perform official duties in the insured's capacity as an officer or employee and caused by the insured." [Emphasis supplied.] Id., supra. Because negligence in performing official acts is covered by this insurance, these officers' official immunity is waived to the extent to which this coverage will pay for the claims asserted. DeKalb County School Dist. v. Bowden, 177 Ga. App. 296, 300 (339 SE2d 356) (1985), cert. denied.[1] And, insofar as the department is

---

[1] Rea v. Bunce, 179 Ga. App. 628, 630 (347 SE2d 676) (1986), reached the opposite result relying on Robinson v. City of Decatur, supra, 253 Ga. at 780 (4). Insofar as these opinions are inconsistent with 1983 Const., Art. I, Sec. 2, Para. 9, they must be and hereby are overruled.

vicariously liable for the acts of its servants, here Hardison and Cochran, for whom insurance is provided, then sovereign immunity is waived to the extent of the available insurance.[2] 1983 Ga. Const., Art. I, Sec. 2, Para. 9. It follows, therefore, that Hardison and Cochran were not entitled to summary judgment on the ground of official immunity, nor the Department of Public Safety, on the basis of sovereign immunity.

---

[2] Contrary to the Department's assertion, this holding does not amount to an erosion of the doctrine of sovereign immunity beyond that authorized by the 1983 Constitution. No law requires the providing of insurance. No law requires either a private carrier or a self-insurance plan to cover such an event. But if such insurance is in effect, contracting to pay for damages arising from the conduct for which the claim is asserted, then that contract is enforceable, and the claim is to be paid to the limits of the contract, sovereign immunity notwithstanding. Conversely, to the extent and if, for any reason, such payment is not required under the contract, there is no waiver of immunity.

3. Defendants Hardison and Cochran next urge they were not negligent as a matter of law and were nevertheless entitled to summary judgment. Cochran relies on OCGA Section 40-6-6, allowing a "driver of an emergency vehicle. . .when in the pursuit of an actual or suspected violator of the law. . ." to violate rules of the road "only when such vehicle is making use of an audible signal and use of a . . . red . . . or blue light. . . ." Subsection (d) of that same code section provides, however, that "the foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons." We cannot say, on the record here before us,[3] that no genuine issue of facts remains as to Cochran's

---

[3] Trooper Cochran's incident report reveals numerous life-threatening instances during the chase, both before and after Seabolt became involved.

liability. City of Winterville v. Strickland, 127 Ga. App. 716, 718 (194 SE2d 623) (1972).

We reach a different result as to the negligence claims against Hardison. These claims allege that he, as head of the State Patrol, failed to provide objective standards for high-speed chases and failed to train his officers properly in such techniques. Included in the record is Policy Statement Number 21, which sets out detailed guidelines for pursuit driving, and a handbook for a Georgia State Patrol Pursuit Training School.

The plaintiff submitted accident reports showing that numerous fatalities had resulted in this state from high-speed chases over the past few years, and the testimony of an expert, a co-founder of the National Academy of Police Driving in Texas, who concluded after studying the

Patrol's pursuit materials that these "documents failed to set forth an objective standard of care by which Georgia State Troopers can determine how to govern their conduct before, during and after the initiation of high speed pursuit cases on the public roads,. . ." However, no objective guidelines which might have been appropriate or facts which show the department's guidelines and training are inadequate were set out in his affidavit. Futhermore, no attempt was made to relate this asserted lack of guidelines and training to Cochran's conduct in pursuing Brewer. We, therefore, conclude that no material issue of fact remains as to the negligence of Hardison, and he was properly granted summary judgment by the trial court.

4. The last question is whether under these same facts a claim under 42 USCA

Section 1983 will lie against former Commissioner Hugh Hardison for maintaining an official policy wherein the department failed to train officers properly and to establish adequate guidelines for high-speed pursuit, and against Officer Cochran for negligently creating a risk to the plaintiff by initiating and pursuing the high-speed chase.

Section 1983 creates a private cause of action for the deprivation of constitutional interests. "[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under Section 1983." [Emphasis supplied.] Monell v. Dept. of Social Services of the City of New York, 436 U.S. 658, 694 (98 S.C. 2018, 56 LE2d 611) (1977). This federal law permits

redress to injured citizens for abuses of governmental power amounting to a deprivation of due process. Therefore, mere negligence by a governmental employee does not rise to the level of such a constitutional tort. Daniels v. Williams, 474 U.S. 329 (106 S.C. 662, 88 LE2d 662) (1986); Davison v. Cannon, 474 U.S. 344 (106 S.C. 668, 88 LE2d 677) (1986). In City of Cave Spring v. Mason, 252 Ga. 3, 4-5 (310 SE2d 892) (1984), we restated the standard: "We interpret 42 USCA Section 1983 to create a cause of action, cognizable by the courts of this state, based upon acts which are in implementation of an intentional policy, adopted or ratified by the governing body of a public agency, which acts work deprivation of a constitutional right. Such a policy may be formal or informal, acknowledged or vigorously denied, persistent or

intermittent, or implemented by but one single act. What is required to be proved, directly or circumstantially, is that a governing body has worked constitutional deprivation of a citizen pursuant to an impermissable or corrupt policy which is intentional and deliberate." [Emphasis in original.]

Officer D.E. Cochran under these facts is not liable under 42 USCA Section 1983 for acting under color of state law to deprive plaintiff of a right, privilege or immunity guaranteed by the Constitution or laws of the United States. As was said in Cannon v. Taylor, 782 F.2d 947, 950 (11th Cir. 1986), "[A]utomobile negligence actions [against a policeman acting in the line of duty] are grist for the state law mill. But they do not rise to the level of a constitutional deprivation."

Plaintiff urges, however, that the failure of the Department of Public Safety

to provide adequate guidelines for its officers in the face of mounting evidence of damage caused as a result of high-speed chases does arise to a "policy or custom" which will support a Section 1983 action against Hardison and the Department of Public Safety. We cannot say, however, that this public official was "deliberately indifferent or grossly negligent in respecting citizens' rights or [that he] tacitly authorized constitutionally offensive conduct. . . .It is clear . . .that at least a showing of gross negligence will be necessary to establish liability for inadequate training. See Reeves v. City of Jackson, 608 F.2d 644, 652 (5th Cir. 1979)." Cannon v. Taylor, supra 782, F.2d at 951.

We must, therefore, conclude that the trial court correctly granted summary judgment as to plaintiff's 42 USCA Section

1983 claims.

5. The order transferring the case to Lumpkin County is vacated.

Judgment affirmed as to Hardison; affirmed in part, reversed in part as to Cochran, and reversed as to the Department of Public Safety. Transfer vacated. All the Justices concur.

"APPENDIX II"

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

PATRICK CURTIS MARTIN, Plaintiff,	)	
v.	)	Civil Action No. D-21142
ALAN SEABOLT, ET AL., Defendants	)	

ORDER GRANTING MOTIONS FOR SUMMARY JUDGMENT OF DEFENDANTS GEORGIA DEPARTMENT OF PUBLIC SAFETY, HUGH HARDISON AND D.E. COCHRAN

This case is presently before the Court on the Motions for Summary Judgment of Defendants Georgia Department of Public Safety, Hugh Hardison and D.E. Cochran. After considering the motions, briefs, arguments of counsel and the record before the Court, the motions are granted.

SO ORDERED this 5th day of June, 1986.

/s/ Don A. Langham
DON A. LANGHAM, Judge
Superior Court of Fulton County

"APPENDIX III"

FILED IN OFFICE
OCT 26 1987
DEPUTY CLERK, SUPERIOR COURT
FULTON COUNTY, GA

IN THE SUPREME COURT OF GEORGIA

PATRICK CURTIS MARTIN, a minor child, by his next friend, ROBERT LEE COLLINS,

(Fulton County Case # D-21142)

APPELLANT,

VS.

CASE NO. 44194

THE GEORGIA DEPARTMENT OF PUBLIC SAFETY, HUGH HARDISON, D. E. COCHRAN, ALAN SEABOLT, KENNETH SEABOLT, CHARLES BREWER and LUMPKIN COUNTY, GEORGIA,

APPELLEES.

10/26/87
CLERK, SUPREME COURT OF GEORGIA

NOTICE OF APPEAL

TO: Clerk, Supreme Court of Georgia
Clerk, Superior Court of Fulton County, Georgia

Notice is hereby given that Patrick Curtis Martin, by and through his undersigned attorney of record, is hereby appealing the decision of the Georgia Supreme Court herein of date July 29, 1987, to the United States Supreme Court. Specifically, Patrick Curtis Martin, Appellant here and the Plaintiff

below, is appealing the decision on the following grounds:

1.

That the Georgia Supreme Court's refusal to abolish the doctrine of sovereign immunity in Georgia as violative of the equal protection guarantee of the federal Constitution is error;

2.

That the Georgia Supreme Court's affirmance of the trial court's grant of summary judgment as to Appellant's 42 U.S.C.A. Section 1983 claim is in error.

Appellant shows that this appeal is being taken pursuant to 28 U.S.C.A. Section 1257(2).

This 26th day of October, 1987.

ATTORNEY FOR APPELLANT/PLAINTIFF

DAVID W. GRIFFETH
State Bar No. 310600

Suite 201
957 Baxter Street
Athens, Georgia 30606

(404) 353-1360

CERTIFICATE OF SERVICE

The undersigned counsel for Appellant does hereby certify that he has served all interested parties with a copy of the foregoing Notice of Appeal prior to filing the same with the Court by placing the same in properly addressed envelopes with sufficient first class postage affixed thereto to carry same to their destination, and addressed as follows:

Mr. Neal B. Childers
Senior Attorney
132 State Judicial Building
440 Capitol Square, S.W.
Atlanta, Georgia 30334

Mr. Robert E. Andrews
Attorney At Law
Post Office Box 310
Gainesville, Georgia 30503

Mr. Reid G. Kennedy
Kennedy and Kennedy
1495 Powers Ferry Road
Marietta, Georgia 30067

Ben L. Weinberg, Jr.
Long, Weinberg, Ansley & Wheeler
2500 Equitable Building
Atlanta, Georgia 30503

This 26th day of October, 1987.

DAVID W. GRIFFETH
State Bar No. 310600

Suite 201
957 Baxter Street
Athens, Georgia 30606

(404) 353-1360

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

PATRICK CURTIS MARTIN,
Appellant,

vs.

THE GEORGIA DEPARTMENT OF
PUBLIC SAFETY, HUGH HARDISON,
and D.E. COCHRAN,
Appellees.

ENTRY OF APPEARANCE

The undersigned does hereby make an entry of appearance as counsel of record for Patrick Curtis Martin, Appellant.

This 27th day of October, 1987.

DAVID W. GRIFFETH,
Counsel of Record

Suite 201
957 Baxter Street
Athens, Georgia 30606
(404) 353-1360

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

PATRICK CURTIS MARTIN,
Appellant,

vs.

THE GEORGIA DEPARTMENT OF
PUBLIC SAFETY, HUGH HARDISON,
and D.E. COCHRAN,
Appellees.

NOTARIZED STATEMENT OF COUNSEL

TO: THE CLERK OF THE SUPREME COURT OF
THE UNITED STATES

I, David W. Griffeth, being a member of the bar of the United States Supreme Court, do swear that on this date, the 27th day of October, 1987, I did deposit at the United States Post Office in Athens, Georgia, forty copies of the enclosed Jurisdictional Statement, with sufficient

postage affixed thereto, and properly addressed as follows:

Clerk
United States Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

And I further certify that to my knowledge this mailing did take place within the permitted time allowed by the rules of this Court.

DAVID W. GRIFFETH,
Counsel of Record

Suite 201
957 Baxter Street
Athens, Georgia 30606
(404) 353-1360

Sworn to and subscribed before me,

this 27th day of October, 1987.

Notary Public, County of Clarke,
State of Georgia.
My Commission Expires: 4-4-1991.

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

PATRICK CURTIS MARTIN,
Appellant,

vs.

THE GEORGIA DEPARTMENT OF
PUBLIC SAFETY, HUGH HARDISON,
and D.E. COCHRAN,
Appellees.

CERTIFICATE OF SERVICE

The undersigned counsel of record for Appellant Patrick Curtis Martin does hereby certify that he has served all parties required to be served with the accompanying Jurisdictional Statement and Appendices and Entry of Appearance prior to filing the same with the Court by placing three copies each of the same in the United States Post Office in Athens, Georgia, in properly

addressed envelopes with sufficient first class postage affixed thereto to carry same to their destination, and addressed as follows:

Mr. Neal B. Childers
Senior Attorney
132 State Judicial Building
440 Capitol Square, S.W.
Atlanta, Georgia 30334

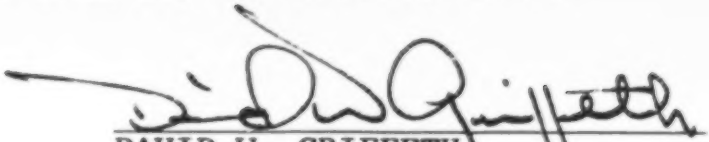
Mr. Robert E. Andrews
Attorney At Law
Post Office Box 310
Gainesville, Georgia 30503

Mr. Reid G. Kennedy
Kennedy and Kennedy
1495 Powers Ferry Road
Marietta, Georgia 30067

Ben L. Weinberg, Jr.
Long, Weinberg, Ansley & Wheeler
2500 Equitable Building
Atlanta, Georgia 30503

Said service was made in compliance with rule 28 of the rules of the Supreme Court of the United States.

This 27th day of October, 1987.



DAVID W. GRIFFETH
Counsel of Record

Suite 201
957 Baxter Street
Athens, Georgia 30606
(404) 353-1360

Supreme Court, U.S.
FILED
NOV 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-719

In The
Supreme Court of the United States
October Term, 1987

PATRICK CURTIS MARTIN,
Appellant,

v

THE GEORGIA DEPARTMENT OF PUBLIC SAFETY, HUGH HARDISON, and D. E. COCHRAN,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

APPELLEES' MOTION TO DISMISS OR AFFIRM

NEAL B. CHILDERS
Assistant Attorney General
Counsel of Record
MICHAEL J. BOWERS
Attorney General
MARION O. GORDON
First Assistant Attorney General
DARYL A. ROBINSON
Senior Assistant Attorney General

Please serve:
NEAL B. CHILDERS
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3355

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED

(1) Whether the Eleventh Amendment divests this Court of jurisdiction to entertain Appellant's claim that Georgia's constitutional provision reserving Georgia's sovereign immunity deprives Appellant of equal protection of the laws by foreclosing a recovery in damages from the State Treasury?

(2) Whether this Court has jurisdiction to consider, by appeal, Appellant's claim that the Georgia Supreme Court erroneously applied 42 U.S.C. § 1983 to the undisputed facts of this case?

(3) Whether Appellant's claims present substantial federal questions for review?

(4) Whether Georgia's paramount interest in fashioning its own law and in protecting its treasury may be overriden by Appellant's desire to maintain a suit for $500,000,000.00 in damages against the Georgia Department of Public Safety and two state employees?

(5) Whether Appellees Hardison and Cochran are entitled to qualified immunity from liability?

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OPINIONS BELOW

The only opinions issued in this case were issued by the Superior Court of Fulton County, Georgia, and by the Supreme Court of Georgia. The opinion of the Supreme Court of Georgia is reported at 257 Ga. 300 (1987). The Order of the Superior Court of Fulton County is unreported. Both opinions are attached to Appellant's Jurisdictional Statement as Appendices.

———o———

JURISDICTION

Appellant invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(2). Appellees submit that the referenced Code section does not grant this Court jurisdiction over this case.

Although there are several issues in the case, for jurisdictional purposes, this appeal may be considered as presenting two issues: (1) an equal protection challenge to Ga. Const. Art. I, Sec. II, Para. IX(a); and (2) whether the Georgia Supreme Court properly applied 42 U.S.C. § 1983 to the facts of the case at bar. 28 U.S.C. § 1257(2) does not grant this Court jurisdiction to consider either issue.

First, with respect to Appellant's equal protection challenge to Ga. Const. Art. I, Sec. II, Para. IX(a), 28 U.S.C. § 1257(2) grants this Court jurisdiction to review, by appeal, cases in which "the validity of a *statute* of any state" is drawn into question under the Constitution, treaties, or laws of the United States and the highest court of a state

has upheld its validity. (Emphasis added). In the instant action, Appellant has not presented, either in the instant appeal or below, any challenge to any state statute. The provision in question is a part of the Georgia Constitution, challenges to which lie outside the grant of jurisdiction set forth in 28 U.S.C. § 1257(2).

The remaining jurisdictional issue, Appellant's contention that the Georgia Supreme Court erroneously applied 42 U.S.C. § 1983 to the facts of the case at bar, is not in any manner, shape, or form a challenge to the validity of a state statute, and 28 U.S.C. § 1257(2) grants no jurisdiction to this Court to hear this issue by way of appeal. Accordingly, Appellees submit that this Court lacks jurisdiction to hear Appellant's appeal.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

In addition to the constitutional and statutory provisions set forth in Appellant's Jurisdictional Statement, Appellees submit that the following provisions are relevant to this case.

United States Constitution, Amendment Eleven:

> The Judicial power to the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

Georgia Constitution, Art. I, Sec. II, Para. IX(a), in pertinent part:

> Sovereign immunity extends to the state and all of its departments and agencies . . . . Also the defense of sovereign immunity is waived as to those actions for the recovery of damages for any claim against the state or any of its departments and agencies for which liability insurance protection for such claims has been provided but only to the extent of any liability insurance provided . . . . No waiver of sovereign immunity shall be construed as a waiver of any immunity provided to the state or its departments and agencies by the United States Constitution.

———o———

STATEMENT OF THE CASE

The instant action arises out of a collision between vehicles driven by Appellee Alan Seabolt and Martha A. Collins (Appellant was a passenger in the Collins vehicle).

On November 9, 1984, one Charles Brewer (a Defendant below who is not a party to this appeal) was observed by Appellee D. E. Cochran, a member of the Uniform Division of the Georgia State Patrol, driving in excess of the speed limit on Georgia Highway 400. Appellee Cochran initiated pursuit of Appellee Brewer who, after first slowing briefly, quickly accelerated and attempted to escape.

Appellee Cochran engaged the visible and audible warning devices (blue emergency lights and siren) on his vehicle and followed Appellee Brewer. Appellee Alan Seabolt, a Deputy Sheriff of Lumpkin County (Appellee Alan Seabolt is a Defendant below but is not a party to the instant appeal), heard radio traffic regarding the pursuit and attempted to render assistance (unsolicited) to

Appellee Cochran. While attemping to reach an intersection in order to set up a roadblock to bring the pursuit of Charles Brewer to a successful conclusion, Appellee Alan Seabolt rounded a curve on the highway upon which the vehicle in which Appellant was a passenger was travelling. After rounding the curve, Appellee Alan Seabolt's vehicle went off of the road on the right side of the roadway. Appellee Alan Seabolt retained control at this time, but before he could regain the roadway, his vehicle struck a culvert on the side of the road and the vehicle was thrown into the oncoming lane of traffic.

The events subsequent to this are the only facts in genuine dispute between the parties. Appellant contends that, while out of control, Appellee Alan Seabolt's vehicle struck the vehicle in which Appellant was a passenger, and that the force of the collision drove the Collins vehicle off of the roadway and down an embankment, causing personal injury to Appellant. Appellant has never, however, submitted any evidence to support this contention. Appellee Alan Seabolt contends that, although his vehicle was thrown into the oncoming traffic lane, the vehicle had come to a complete stop when it was struck by the vehicle driven by Ms. Collins, and that the collision between the vehicles was due to Ms. Collins' failure to take proper precautions after observing the vehicle operated by Appellee Seabolt, on which visible and audible warning devices were likewise operational. That contention was supported by the sworn deposition testimony of Appellees Alan Seabolt and Kenneth Seabolt.

The actual pursuit of Charles Brewer by Appellee Cochran was some distance away from the scene of the

collision. Although the estimates of distance varied somewhat, it is undisputed by all of the parties that Ms. Collins (and Appellant) never observed either Charles Brewer or Appellee Cochran during the entire course of the pursuit (similarly, neither Charles Brewer nor Appellee Cochran ever observed the Collins vehicle during the course of the chase). Appellant's Complaint, as amended, seeks $500,000,000.00 in damages for his personal injuries.

Appellees filed motions for summary judgment in the Superior Court of Fulton County after discovery. The Superior Court conducted a hearing on the motions, and thereafter entered an Order granting the motions.

From that Order, Appellant appealed to the Supreme Court of Georgia, which affirmed the Superior Court's entry of summary judgment in favor of all Appellees with respect to the claims asserted pursuant to 42 U.S.C. § 1983, affirmed the grant of summary judgment to Appellee Hardison on Appellant's state law claims, and reversed the grant of summary judgment to Appellees Cochran and the Georgia Department of Public Safety as to Appellant's state law claims. The opinion of the Georgia Supreme Court was issued, in its final form, on July 29, 1987.

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ARGUMENT AND CITATION OF AUTHORITY

A. MOTION TO DISMISS

I. INTRODUCTION

Appellees submit that this Court may properly dismiss this appeal pursuant to Sup. Ct. R. 16.1. Appellees submit that, with respect to portions of the appeal, the

appeal is not within this Court's jurisdiction, and is therefore subject to dismissal. Other portions of the appeal do not present substantial federal questions; still other portions of the appeal should be dismissed, as the judgment below rests upon adequate state grounds, and review by this Court would not be dispositive in this case. These contentions are set forth in more detail *infra*.

II. THIS COURT LACKS JURISDICTION TO CONSIDER THE APPEAL AS TO ALL CLAIMS AGAINST THE GEORGIA DEPARTMENT OF PUBLIC SAFETY AND THE CLAIMS AGAINST APPELLEES HARDISON AND COCHRAN IN THEIR OFFICIAL CAPACITIES.

The Eleventh Amendment to the United States Constitution provides that the federal courts lack subject-matter jurisdiction to hear cases in which the state, its departments, or its agencies are named as defendants. *Alabama v. Pugh*, 438 U.S. 781 (1978). Although actions may be brought against state officials in their official capacities for prospective relief, suits for damages against these officials in their official capacities are barred. *Kentucky v. Graham*, 473 U.S. 159, 169 (1985). Thus, as the only relief sought in the case at bar is an award of damages, the Eleventh Amendment forecloses the exercise of jurisdiction by this Court over Appellee Georgia Department of Public Safety and Appellees Hardison and Cochran in their official capacities.

Therefore, it is submitted by Appellees that this Court lacks subject-matter jurisdiction to consider and rule upon Appellant's claim that the provision of Georgia's Constitution reserving sovereign immunity to the State of Georgia and its departments and agencies is unconstitutional,

as such would result in the exercise of jurisdiction by the federal courts in a claim for damages against the state and its officials in their official capacities. The Eleventh Amendment clearly forecloses that exercise of jurisdiction.

The defense of sovereign immunity under Georgia law affords a defense only to the state, its departments and agencies, and to individual employees only to the extent they are sued in their official capacities. *Hennessy v. Webb,* 245 Ga. 329, 330 (1980). Thus, in this case, those aspects of Appellant's claim to which Georgia's sovereign immunity operates as a bar are congruent with those claims over which the Eleventh Amendment to the United States Constitution prohibits the exercise of jurisdiction by this Court.

Therefore, it is submitted by Appellees that this Court has no jurisdiction to consider Appellant's contention that Georgia's constitutional sovereign immunity provision violates the United States Constitution, as the Eleventh Amendment to the United States Constitution is a complete bar to the exercise of jurisdiction by this Court to grant the relief sought by Appellant.

III. THIS COURT LACKS JURISDICTION TO CONSIDER APPELLANT'S STATE NEGLIGENCE CLAIMS AGAINST APPELLEES HARDISON AND COCHRAN, AS THOSE JUDGMENTS REST ON AN ADEQUATE NON-FEDERAL BASIS AND PRESENT NO GROUND FOR REVIEW BY THE UNITED STATES SUPREME COURT.

As an initial matter, it should be noted that Appellant's state negligence claim against Appellee Cochran was

remanded for trial by the Georgia Supreme Court. Thus, that claim against Appellee Cochran is not within the scope of the appeal. The Supreme Court upheld the dismissal of Appellant's state negligence claims against Appellee Hardison on purely state-law grounds, and thus that decision likewise presents nothing for this Court to review.

IV. THIS COURT LACKS JURISDICTION TO REVIEW THE GEORGIA SUPREME COURT'S AFFIRMANCE OF THE DISMISSAL OF APPELLANT'S CLAIMS PURSUANT TO 42 U.S.C. § 1983 AGAINST APPELLEES HARDISON AND COCHRAN IN THEIR INDIVIDUAL CAPACITIES.

The only remaining claims presented by Appellant's appeal concern the dismissal of the claims brought pursuant to 42 U.S.C. § 1983 by the Superior Court, and the affirmance of that ruling by the Georgia Supreme Court. It is respectfully submitted by Appellees that this Honorable Court lacks jurisdiction to consider that ruling in the case at bar. A careful review of Appellant's appeal indicates that he invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(2). That statutory provision grants this Court the authority to review, by appeal, a decision from the highest appellate court of a state upholding a state statute which has been challenged pursuant to the United States Constitution, treaties, or laws. That statutory provision does not grant this Court jurisdiction to consider the application of the facts of this case to 42 U.S.C. § 1983. Accordingly, Appellees respectfully urge that this Honorable Court lacks jurisdiction to consider, by appeal, the Georgia Supreme Court's determination that the undis-

puted facts in the case at bar did not establish liability against Appellees in their individual capacities pursuant to 42 U.S.C. § 1983.

V. THE APPEAL FROM THE GEORGIA SUPREME COURT DOES NOT PRESENT SUBSTANTIAL FEDERAL QUESTIONS.

As noted *supra,* Appellant's appeal essentially presents two issues for review by this Court: first, a contention that Georgia's constitutional reservation of sovereign immunity violates Appellant's right to equal protection of the laws; and, second, a contention that the Georgia Supreme Court erroneously applied the undisputed facts in this case to 42 U.S.C. § 1983 in concluding that Appellees were entitled to judgment in their favor on that claim. Appellees submit that neither of those issues presents a substantial federal question for review by this Court, and also request that the Court dismiss the appeal on this ground as well.

In Georgia, the doctrine of sovereign immunity provides that the state, its departments, boards, and agencies, and its officials in their official capacities, are not subject to suit without the express consent of the state, absent the operation of one of three express waiver mechanisms contained in the Constitution. Ga. Const. Art. I, Sec. II, Para. IX; *Martin v. Department of Public Safety,* 257 Ga. 300 (1987).

The doctrine of sovereign immunity arose at English common law, based upon two considerations: first, the legal fiction that "the King can do no wrong"; and, second, from the reality that the King could not be sued in

his own Court, and there was no higher authority which could exercise jurisdiction over the King. *See generally, Nevada v. Hall,* 440 U.S. 410, 415 (1979); Sovereign Immunity in Georgia, 27 Emory L. J. 717 (1978). Georgia incorporated the doctrine of sovereign immunity by virtue of its adoption of the common law of England, by Act of the General Assembly of February 25, 1784. *Crowder v. Department of State Parks,* 228 Ga. 436, 439 (1971).

Georgia's courts consistently followed the rule of sovereign immunity where suit was brought against the state, a department or agency of the state, or against state officials in their official capacities, although there were occasional dissenting opinions criticizing the continued vability of the doctrine. However, Georgia's courts did not abolish the doctrine, consistent with Justice Lumpkin's admonition in *Georgia Military Institute v. Simpson,* 31 Ga. 273 (1860), that any change in the status of sovereign immunity was to be made by the Legislature, not by the courts. As the Georgia Supreme Court recognized in *Roberts v. Barwick,* 187 Ga. 691, 694 (1930), if sovereign immunity did not have the approval of the people of Georgia, the General Assembly, the people's elected representatives, could simply consent to suit against the state. The General Assembly has never, however, done so.

In 1974, the status of sovereign immunity was changed when an Amendment was added to the Georgia Constitution, authorizing the General Assembly to create a State Court of Claims with jurisdiction over certain specified claims. That Amendment expressly reserved sovereign immunity except to the extent of waiver by the Constitution or by other act of the General Assembly. Georgia

Const. 1976, Art. VI, Sec. V, Para. I. The Georgia Supreme Court subsequently ruled that, in light of the constitutional provision, the Court lacked the authority to abrogate or modify the doctrine, which could no longer be modified or abrogated except by constitutional amendment or act of the General Assembly. *Sheley v. Board of Public Education for the City of Savannah*, 233 Ga. 487 (1974).

In 1983, a new Constitution of the State of Georgia was enacted, including therein a specific provision reserving sovereign immunity to the state and all of its departments and agencies. Georgia Const. 1983, Art. I, Sec. II, Para. IX(a). The Amendment provides three mechanisms for waiver of sovereign immunity, but expressly reserves sovereign immunity in all other cases. As the Georgia Supreme Court noted in its decision below, "present public policy has been very clearly expressed by the passage of the . . . constitutional provision." *Martin, supra*, at 301.

Although not mentioned in Appellant's jurisdictional statement, the United States of America possesses a similar immunity, also derived from English common law. The United States may not be sued without giving its consent to the specific suit, unless the United States has previously consented to maintenance of that type of suit against it, Even when the United States consents to suit, the terms of the waiver define the outer limits of the Court's jurisdiction. *United States v. Mottaz*, 476 U.S. —, 90 L.Ed.2d 841, 850 (1986); *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *United States v. Kubrick*, 444 U.S. 111, 117-18 (1979). It would certainly be anomalous for the same immunity of Georgia to violate the United States Constitution when the United States' own sovereign immunity does not do so.

Georgia's own law cloaks it with immunity from suit in its own courts. Suits against Georgia in the federal courts are barred, not by Georgia's own law, but by the Eleventh Amendment to the United States Constitution. Shortly after the adoption of the United States Consitution in 1789, one Chisholm filed suit against the State of Georgia, bringing an action in assumpsit, seeking to recover damages from the State of Georgia. This Court held that Art. III of the United States Constitution extended the judicial power of the United States to allow the federal courts to entertain suits brought by individuals against non-consenting states. *Chisholm v. Georgia*, 2 Dall. 419, 1 L.Ed. 440 (1793). The decision by this Court in *Chisholm* led to what may charitably be described as an uproar. The decision led to "the prompt adoption" of the Eleventh Amendment to the United States Constitution. *Nevada v. Hall*, 440 U.S. 410, 420 (1979). The Eleventh Amendment, like the federal government's sovereign immunity, is more than simply an immunity from suit; the Eleventh Amendment "places explicit limits on the powers of federal courts to entertain suits against a state." *Id.* Indeed, neither the Constitution nor laws of the United States create any right of individuals to sue a state in either federal or state courts. *Palmer v. Ohio*, 248 U.S. 32, 34 (1918).

Accordingly, it is submitted by Appellees that Appellant's contention that Georgia's constitutional provision preserving Georgia's sovereign immunity deprives Appellant of equal protection of the laws presents no substantial federal question for review by this Court. *See, e.g., Huffman v. Kentucky*, 435 U.S. 991 (1978); *Krause v. Ohio*, 409 U.S. 102, *reh. denied*, 410 U.S. 918 (1972).

B. APPELLEES' MOTION TO AFFIRM

I. THE RESERVATION OF SOVEREIGN IMMUNITY BY THE CONSTITUTION OF THE STATE OF GEORGIA IS CONSISTENT WITH THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.

As noted by the Georgia Supreme Court in the opinion below, Georgia's constitutional reservation of sovereign immunity is a clearly expressed public policy with the intent to "preserve the protection of the public purse . . . ." *Martin, supra,* at 301. Appellant argues that sovereign immunity "establishes invidious classifications which . . . draw . . . a discriminatory distinction between victims of negligence injured by a private, non-governmental tortfeasor, and those injured by a public, governmental tortfeasor." Jurisdictional Statement, at 7. However, as the decision below makes clear, the "classification" posited by Appellant is not the relevant distinction made by Georgia's sovereign immunity. The Georgia Supreme Court clearly pointed out that the distinction to be made is *not* based upon whether the defendant was a private citizen or public employee; rather, the relevant inquiry is where any funds to satisfy a judgment would be obtained. Even if the defendant is a public employee, if there are insurance funds available to provide compensation for injuries, immunity is waived to the extent of that insurance: it is only the public treasury that is protected by sovereign immunity. *Martin, supra,* at 301.

It should be noted in this case that the sovereign immunity defense raised by the Georgia Department of Public Safety and by Appellees Hardison and Cochran in their official capacities is not a newly created defense. Ap-

pellees have not sought to apply a defense created subsequent to the injury so as to defeat a previously accrued cause of action; rather, as set forth *supra*, sovereign immunity has been a bedrock of Georgia law since Georgia entered the Union. With this in mind, it must be remembered that the State of Georgia has the inherent power and authority to fashion its own rules of tort law pursuant to the Tenth Amendment. The immunity of the state from suit is simply an aspect of Georgia's definition of any potential cause of action. *Martinez v. California*, 444 U.S. 277, 282 n.5 (1980).

Appellant contends that the Georgia Supreme Court was required to review sovereign immunity under a "strict scrutiny" analysis, and that Georgia's sovereign immunity must fall because it neither serves a compelling state interest, nor is it precisely structured as the least drastic means for effecting the state's intent. Jurisdictional Statement, at 8. Appellant mispereceives the appropriate standard of review. As noted *infra*, Appellees submit that this Court lacks jurisdiction to review Appellant's contention in this respect. Alternatively, however, Appellees would submit that the Georgia Supreme Court has properly upheld Georgia's reservation of sovereign immunity in the face of Appellant's challenge. The proper standard of review is not, as Appellant submits, "strict scrutiny"; rather, the proper standard of review is whether there is a rational relationship between Georgia's purpose and the constitutional provision. *Martinez*, *supra*, at 282. Clearly, a reservation of sovereign immunity that operates only when a claim is sought to be enforced against the State Treasury is rationally related to the strong public policy of protecting the public treasury from the depredations of

litigation. Furthermore, of course, Georgia's interest in fashioning its own causes of action and defenses to those causes of action "is paramount to any discernible federal interest . . . ." *Id.* Accordingly, it is clear that Georgia's constitutional reservation of sovereign immunity does not operate to deprive Appellant of the equal protection of the laws.

II. THE COURT NEED NOT RESOLVE THE QUESTIONS PRESENTED IN APPELLANT'S REQUEST FOR REVIEW OF THE GEORGIA SUPREME COURT'S DETERMINATION THAT NO CAUSE OF ACTION AROSE PURSUANT TO 42 U.S.C. § 1983 UNDER THE FACTS OF THIS CASE.

The remaining questions presented by Appellant are merely different aspects of his request that this Court review the conclusion of the Georgia Supreme Court that the undisputed facts in this case did not arise to the level of a constitutional violation and accordingly did not give rise to a cause of action pursuant to 42 U.S.C. § 1983. Appellant asserts that it is important for this Court to review that decision, because "the Supreme Court of Georgia has decided an important question of federal law which has not been, but should be, decided by this Court." Jurisdictional Statement, pp. 10, 16, 22.

Whether or not it is true that this Court should eventually decide these issues, they are not properly before the Court for decision in the case at bar. Appellees Hardison and Cochran have consistently raised, since the amendment of Appellant's complaint to add claims pursuant to 42 U.S.C. § 1983, the defense of qualified immunity. Government officials are shielded from liability under 42 U.S.C.

§ 1983 "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The inquiry is limited to determining whether the defendant's conduct was *objectively* reasonable, measured against "clearly established law." *Id.*

Below, Appellees Hardison and Cochran took the position that Appellant's 42 U.S.C. § 1983 claim did not state a cause of action pursuant to 42 U.S.C. § 1983 and, alternatively, that even if a claim was made out under the statute, that they were entitled to qualified immunity. The Georgia Supreme Court, relying upon *Cannon v. Taylor*, 782 F.2d 947, 950 (11th Cir. 1986), held that Appellant had no claim pursuant to 42 U.S.C. § 1983, and accordingly did not reach the issue of qualified immunity. However, it is clear that, at a minimum, Appellees are entitled to qualified immunity, and this Court therefore need not reach the issue of whether Appellant might, in the absence of that immunity, have a claim.

As noted, in reaching its conclusion that Appellant had no claim pursuant to 42 U.S.C. § 1983, the Georgia Supreme Court relied upon a decision of the Eleventh Circuit Court of Appeals, in which it was held that actions against a policeman acting in the line of duty arising out of unintentional automobile collisions may well state a claim for relief under state law, but do not rise to the level of a constitutional deprivation. As noted *supra*, Appellant contends that this Court should review the decision because it is an important question of federal law not yet decided by this Court. Appellant does *not* contend that any other

of the federal circuit courts of appeal have reached conflicting rulings on the subject which require resolution by this Court. Therefore, it may appropriately be assumed that the other courts of appeal which have had occasion to pass on the issue presented herein have, as has the Eleventh Circuit, concluded that no cause of action arises under 42 U.S.C. § 1983, as no constitutional deprivation has occurred. Thus, as this Court has never ruled upon the issue, and as the courts of appeal, including the Court of Appeal in the Circuit in which the parties to the case at bar reside, have concluded that the actions of Appellees do not constitute violations of constitutional rights, it is clear that Appellees' conduct did not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow, supra,* at 818.

Government officials are not required to predict unfailingly the course of the law and future decisions of the courts of our nation. As noted just this past term by this Court, the right allegedly violated by the defendants "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton,* 483 U.S. —, 97 L.Ed.2d 523, 531 (1987). *See also Mitchell v. Forsyth,* 472 U.S. 511, 528 (1985) (officials are immune unless "the law clearly proscribe the actions" taken by the defendants). Thus, it is beyond dispute that the actions of Appellees violated no clearly established rights of Appellant on November 9, 1984, when this incident occurred. Indeed, as Appellant admits in his Jurisdictional Statement, there is no clearly established law providing that Appellees' conduct violated Appellant's rights even as of the date of writing of the Jurisdictional Statement of Appellant and Appellees' Motion to Dismiss or Affirm. The *only* authority which addresses the issue

provides that Appellees' actions did not violate any of Appellant's constitutional rights.

Accordingly, it is submitted by Appellees that the determination of the Georgia Supreme Court should be affirmed on the basis of Appellees' qualified immunity, and that this Court need not go further to render what would be, in reality, merely an advisory opinion on any other issues presented with respect to Appellant's 42 U.S.C. § 1983 claim.

CONCLUSION

Appellees respectfully request that this Honorable Court grant their Motion to Dismiss the Appeal or, in the alternative, that the determination of the Georgia Supreme Court be affirmed without further briefing or argument.

Respectfully submitted,

MICHAEL J. BOWERS 071650
Attorney General

MARION O. GORDON 302300
First Assistant Attorney General

DARYL A. ROBINSON 610012
Senior Assistant Attorney General

NEAL B. CHILDERS 124410
Assistant Attorney General
Counsel of Record

Please serve:

NEAL B. CHILDERS
Assistant Attorney General
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3355

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No. 87-719

In The
Supreme Court of the United States
October Term, 1987

PATRICK CURTIS MARTIN,

Appellant,

vs.

THE GEORGIA DEPARTMENT OF PUBLIC SAFETY, HUGH HARDISON AND D.E. COCHRAN,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

BRIEF OPPOSING APPELLEES' MOTION TO DISMISS OR AFFIRM

David W. Griffeth
Counsel of Record

J. Richardson Brannon

Suite 201
957 Baxter Street
Athens, Georgia 30606
Telephone: (404) 353-1360

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

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STATEMENT OF FACTS

Appellant incorporates herein the statement of facts as presented in his Jurisdictional Statement, and therefore will not repeat them. However, Appellant does dispute Appellees' statement of facts as contained in their Motion to Dismiss or Affirm.

Appellees state that it is undisputed that Defendant Alan Seabolt (not a party to this appeal) "heard radio traffic regarding the pursuit and attempted to render assistance (unsolicited) to Appellee Cochran." Appellees' Motion To Dismiss or Affirm, at p. 3. This is a gross misstatement of the facts of this case. The Georgia Supreme Court's opinion states, in relevant part,

> During the chase, Cochran was in radio contact with Alan Seabolt, a Lumpkin County Deputy Sheriff. The plan was that Seabolt would attempt to block an intersection ahead of Brewer and Cochran, thus ending the chase. At one point, Cochran requested Seabolt to hurry . . .

Martin v. Georgia Department of Public Safety, 257 Ga. 300, 301 (1987). Appellees somehow interpret the above passage to mean that Defendant Alan Seabolt's assistance was "unsolicited" by Appellee Cochran. This imaginative interpretation of the facts is clearly wrong, and to suggest that Appellant does not dispute the accuracy of this interpretation is nonsense.

I. THE ISSUES PRESENTED IN APPELLANT'S JURISDICTIONAL STATEMENT ARE PROPERLY BEFORE THIS COURT.

Appellant has invoked the jurisdiction of this Court under 28 U.S.C. § 1257(2). Appellees contend that this

section does not grant this Court jurisdiction to consider the issues raised by Appellant's Jurisdictional Statement. Appellees are wrong.

Appellant has challenged a provision of the Georgia Constitution as being violative of the Fourteenth Amendment's equal protection clause. The language of Section 1257(2) refers to a "statute of any state". This has been defined to encompass state constitutional provisions. See, *Railway Express Co. v. Virginia,* 282 U.S. 440 (1930); *Adamson v. California,* 332 U.S. 46 (1946); and *Torcaso v. Watkins,* 367 U.S. 488 (1960). Accordingly, this appeal is properly before this Court.

Appellant's Jurisdictional Statement also assigns as error the Georgia Supreme Court's denial of Appellant's 42 U.S.C. Section 1983 cause of action against Appellees. Because this appeal is properly before this Court, the Appellant may include in his assignments of error "any other denial of federal right whether or not capable in itself of being brought here by appeal." *Flourney v. Wiener,* 321 U.S. 253, 263 (1943). See also, *Prudential Insurance Co. v. Check,* 259 U.S. 530 (1921). Clearly, Appellant's entire Jurisdictional Statement is properly before this Court.

II. THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION DOES NOT PROHIBIT THE EXERCISE OF JURISDICTION BY THIS COURT.

This action has been brought by a Georgia citizen against a Georgia department, Georgia officials, and others in a state court of Georgia. The Eleventh Amendment,

which limits the federal judicial power, is by its very language not applicable to actions in state courts. Furthermore, the Eleventh Amendment has not been interpreted as a bar to actions brought in state courts. See, *Martinez v. California,* 444 U.S. 277, 283 n.7 (1980); and *Employees v. Missouri Public Health Department,* 411 U.S. 279, 298 (1972).

In a 42 U.S.C. Section 1983 cause of action brought in a state court of Maine this Court held that "no Eleventh Amendment question is present, of course, where an action is brought in a state court since the Amendment, by its terms, restrains only '(t)he Judicial power of the United States.'" *Maine v. Thiboutot,* 448 U.S. 1, 9 n.7 (1980).

Neither is the Eleventh Amendment a bar to the appeal before this Court. It has been well settled since *Cohens v. Virgina,* 19 U.S. (6 Wheat.) 264 (1821) that a suit begun in state court and appealed to the United States Supreme Court is not within the prohibition of the Eleventh Amendment. In *Cohens,* Chief Justice Marshall wrote, at 410, that "the effect of a writ of error is simply to bring the record into court. . . . [T]he transfer of this record into the supreme court, for the sole purpose of inquiring whether the judgment violates the constitution or laws of the United States, can, with no propriety, we think, be denominated a suit commenced or prosecuted against the state whose judgment is so far re-examined." Appellees' contention that this appeal to the Supreme Court is proscribed by the Eleventh Amendment is therefore without merit.

III. APPELLEES HARDISON AND COCHRAN ARE NOT ENTITLED TO QUALIFIED IMMUNITY UNDER 42 U.S.C. SECTION 1983

Appellees Hardison and Cochran claim that they are entitled to qualified immunity as government officials and that this Court therefore need not reach the questions presented for review under Appellant's 42 U.S.C. Section 1983 claim. Qualified immunity is a defense to liability, and while an official may be able to assert the defense in a personal-capacity action (which assertion, Appellant contends, would be without merit in the case sub judice), the defense is not available in an official-capacity action. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). Appellees Hardison and Cochran were named in both their official and their personal capacities, and they are clearly not entitled to the defense of qualified immunity in their official capacities.

The question of whether these Appellees may be shielded from personal liability for their actions under color of state law depends on the "objective legal reasonableness" of those actions. *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982). Government officials may claim qualified immunity only in those instances where their actions could reasonably have been thought to be consistent with established rights. "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful [cited omitted]; but it is to say that in the light of pre-existing law, the unlawfulness must be ap-

parent." *Anderson v. Creighton*, 483 U.S. —, 97 L.Ed.2d 523, 531 (1987).

Appellant asserts that the contours of the right to due process of law have been clearly established, and that Appellees' actions which succeeded in depriving Appellant of his right to life and liberty were plainly in violation of that right. Thus it is beyond dispute that the actions of Appellees violated clearly established rights of the Appellant on November 9, 1984, and Appellees cannot be shielded from liability under 42 U.S.C. 1983 by asserting the defense of qualified immunity.

CONCLUSION

For the above and foregong reasons, Appellant asks this Court to deny Appellees' Motion to Dismiss or Affirm.

Respectfully submitted,

DAVID W. GRIFFETH,
State Bar No. 310600
Counsel of Record
for the Appellant

J. RICHARDSON BRANNON
State Bar No. 077650

Suite 201
957 Baxter Street
Athens, Georgia 30606
(404) 353-1360